

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties confirmed that respondent erroneously identified Docket No. 1,006,553 on its notice of appeal. That claim has been resolved by an agreed

award and is not part of this appeal. Only Docket No. 1,010,045 is presently before the Board.<sup>1</sup>

The parties further agreed that although originally contested, for purposes of this appeal neither the compensability, date of accident (April 6, 2004) nor the average weekly wage (\$456.05) found by the ALJ is in dispute.

### **ISSUES**

The ALJ found that claimant sustained a permanent partial impairment of 12 percent to the body as a whole. This figure is based upon an average of the functional impairment ratings offered by Drs. Chris Fevurly and Pedro Murati, physicians selected by the respondent and claimant, respectively, to examine the claimant and provide a rating. The ALJ's award is silent on the testimony and functional impairment rating offered by Dr. Robert Eyster, the treating physician.

The respondent has appealed alleging the ALJ erred in her failure to include or at least consider Dr. Eyster's opinion that claimant sustained a scheduled injury to his right shoulder only and bears no cervical impairment as a result of his work-related series of accidents. Respondent urges the Board to consider Dr. Eyster's opinions, and at a minimum, average his rating along with that assigned by the other two physicians. Alternatively, respondent suggests the Board follow Dr. Eyster's functional impairment assessment and award a 5 percent functional impairment to claimant's right shoulder only, rejecting claimant's request for a whole body rating.

Claimant requests that the Board increase the amount of compensation awarded to a 19 percent permanent partial disability based upon the impairment rating of Dr. Murati, or alternatively affirm the ALJ's Award. Claimant contends the ALJ's decision to award permanent impairment to the whole body is based upon the testimony of two physicians, both of whom found cervical impairment. Thus, the fact that she seemingly disregarded Dr. Eyster's testimony is inconsequential and does not justify the relief respondent requests. If the Award is not affirmed, claimant contends it should be modified. According to claimant, Dr. Murati's evaluation of the claimant was thorough and took into account all of claimant's complaints. Thus, his 19 percent functional impairment is the more persuasive medical opinion and should be awarded.

The only issue to be determined is the nature and extent of claimant's permanent functional impairment as a result of his April 6, 2004 work-related accident.

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<sup>1</sup> To the extent it is necessary for administrative purposes, this Order shall function as a stipulated dismissal of the appeal in Docket No. 1,006,553.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

While claimant was off work for treatment for a separate work-related injury<sup>2</sup> he noticed pain between his shoulder blades and his neck. According to claimant, he may have noticed these problems in November 2002, but because his bilateral hand complaints were so painful at the time, he did not really notice the pain in his upper back and neck until he was off work in December 2002 following surgery on his hands. The intensity of his complaints, pre-surgery, is documented in the company physician's records. According to claimant, since December 2002, his neck and upper back complaints have continued to get progressively worse.

Claimant reported his upper back and neck complaints to his supervisor and was sent to see Dr. Larry Wilkinson, the company doctor. Claimant had seen Dr. Wilkinson before, in connection with his bilateral hand complaints. On December 11, 2002, he went to see Dr. Wilkinson and reported upper back pain and neck pain.<sup>3</sup> Dr. Wilkinson believed these complaints were possibly related to upper extremity nerve impingement and suggested claimant wait until six weeks post-surgery. He specifically indicated that he did not believe this was related to work "since he is not working."<sup>4</sup>

Thereafter, claimant was evaluated by Dr. Pedro Murati, at his attorney's request. Dr. Murati had evaluated claimant for purposes of his bilateral carpal tunnel claim and on February 12, 2003, he saw claimant in connection with this docketed claim. During the examination, claimant was complaining of pain radiating up into both shoulders and his upper back. Dr. Murati diagnosed bilateral shoulder pain secondary to rotator cuff strain and myofascial pain syndrome affecting the intrascapular region bilaterally. He further suggested claimant was not at maximal medical improvement.<sup>5</sup>

Claimant was referred to Dr. Robert Eyster for treatment of his neck and upper back complaints. Dr. Eyster treated claimant from April 18, 2003 to February 13, 2004. During

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<sup>2</sup> Docket No. 1,006,553 is a claim involving claimant's bilateral carpal tunnel syndrome.

<sup>3</sup> Wilkinson Depo. at 8.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> Murati Depo. (Oct. 3, 2003), Ex 3 at 2-3 (2-13-03 IME report).

the course of his treatment, claimant complained of pain in the right shoulder and neck. Dr. Eyster had x-rays taken of the right shoulder and of the neck. Claimant was treated conservatively and given an injection in the right acromioclavicular (AC) joint. In May 2003, claimant's complaints of pain were in both shoulders, the right being more problematic. Dr. Eyster ordered an MRI of the right shoulder which revealed no rotator cuff tear but did evidence hypertrophy (an arthritic condition) of the AC joint. Dr. Eyster repeatedly suggested the possibility of a diagnostic arthroscopy, but claimant ultimately rejected that suggestion preferring to settle his claim.

At the last visit, Dr. Eyster opined that claimant had a 5 percent impairment to the right shoulder based upon the 4<sup>th</sup> Edition of the *Guides*.<sup>6</sup> Dr. Eyster testified that the condition he noticed in claimant was something that occurs over a period of time as opposed to a sudden incident. He stated that it was also a condition that could continue to worsen as a person continues to do work activities. As a result he assigned claimant a 5 percent impairment for the work aggravation. Dr. Eyster confirmed that it would be fair to say that claimant's neck and shoulder complaints began sometime after he had carpal tunnel surgery, and that he had no opinion as to whether these complaints were present before the surgery. When asked, Dr. Eyster explained that he did not assign a rating to the left shoulder because he did not think that there was any objective findings that warranted an impairment rating. This was also the case with the neck complaints.<sup>7</sup>

In November 2003, Dr. Murati again saw claimant and at that time apparently found him to be at maximum medical improvement. His report indicates claimant was complaining of pain in both shoulders and elbows and in his low back radiating into his hips. According to Dr. Murati, claimant reported the onset of back complaints around January 6, 2003. This is the first notation of low back pain in any of the relevant medical records, including Dr. Murati's second examination of claimant in February 2003. During the course of this most recent examination Dr. Murati noted a positive impingement examination in both shoulders, no crepitus (although he found crepitus in an earlier examination in connection with claimant's other claim) and limited range of motion in the bilateral lateral flexion. He also identified a depressed right ankle reflex which he believed confirmed radiculopathy in the low back.

Dr. Murati diagnosed right SI joint dysfunction, low back pain secondary to radiculopathy, myofascial pain syndrome in the bilateral shoulders and cervical spine, right

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<sup>6</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>7</sup> Eyster Depo. at 14-15.

shoulder pain secondary to impingement and left shoulder pain secondary to rotator cuff strain versus tear.<sup>8</sup> His functional impairment assessment was as follows:

...for the low back pain secondary to radiculopathy, . . . Lumbosacral Category DRE III, for a 10% whole person impairment, using table 72 on page 110. For myofascial pain syndrome affecting the cervical paraspinals, the patient falls into the Cervicothoracic Category DRE II, for a 5% whole person impairment using table 73 on page 110. For the loss of range of motion of the right shoulder, . . . 5% right upper extremity impairment, which converts into a 3% whole person impairment. For the loss of range of motion of the left shoulder,...5% left upper extremity impairment.<sup>9</sup>

When combined, these whole person impairments combine for a 19 percent to the whole body.<sup>10</sup>

Dr. Murati was questioned extensively on the basis for his low back impairment rating, specifically, whether he confirmed his diagnosis of radiculopathy with EMG testing. Dr. Murati testified that he was not authorized to conduct such testing and that in any event, his diagnosis of radiculopathy is independently confirmed by the depressed right ankle reflex he found during his examination of claimant in November 2003.

Dr. Chris Fevurly saw claimant on March 19, 2004 at the request of the respondent. Dr. Fevurly assessed claimant and found that his symptoms were consistent with mild bilateral shoulder impingement most likely due to degenerative changes in the glenohumeral and acromioclavicular joint leading to functional impingement. Put simply, as the bone at the top of the shoulder joint grows down over time, the space between the two bones is decreased, thus causing impingement. Dr. Fevurly found no loss of active range of motion in either shoulder and no evidence of a rotator cuff tear. He did, however, find claimant had chronic cervicothoracic pain and mild to moderate degenerative changes in the cervical and thoracic spine.

Dr. Fevurly ultimately opined that the source of claimant's current shoulder discomfort was predominately the result of degenerative changes in the shoulders resulting as a natural consequence of aging and not directly related to the job duties performed as a press operator, however, the job could aggravate the symptoms.<sup>11</sup>

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<sup>8</sup> Murati Depo. (Apr. 22, 2004), Ex. 2 at 2.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> Fevurly Depo., Ex 2 at 8.

He concluded claimant was at maximum medical improvement and based on the *Guides* believed there was no ratable impairment in either shoulder based on claimant's lack of loss of his active range of motion. According to Dr. Fevurly, the only ratable impairment claimant had was due to his pain in the cervicothoracic area and assigned a 5 percent whole person impairment based on the cervicothoracic spinal impairment Category II.

The ALJ indicated that "[w]hile Dr. Murati's [impairment rating] is higher than that of Dr. Fevurly, the basis for his evaluation is consistent with medical standards and has as much basis for the evaluation as does that of [r]espondent's expert, Dr. Fevurly."<sup>12</sup> Thus, "[b]eing unable to state that one doctor's opinion should outweigh [sic] the other, the Court finds that [c]laimant has sustained a permanent partial impairment of 12 percent to the body as a whole as the result of his injury."<sup>13</sup> It is unclear if the ALJ purposefully discounted the opinions expressed by Dr. Eyster, and merely failed to acknowledge that, or if she failed to consider Dr. Eyster entirely. In any event, the Board finds the ALJ's Award should be modified.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>14</sup> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>15</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>16</sup>

In this instance, the Board finds the claimant has failed to meet his burden of proving he sustained a low back injury as a result of his work-related activities. When claimant first disclosed his physical complaints to the company doctor, he described pain

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<sup>12</sup> ALJ Award (Aug. 9, 2004) at 3.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> K.S.A. 44-501(a).

<sup>15</sup> K.S.A. 44-508(g).

<sup>16</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778.

in his *upper* back and neck. When he saw Dr. Murati, a physician selected by his attorney, in February 2003, he described radiating pain up into both shoulders and the *upper* back. The same complaints were made to Dr. Eyster. Only after he completed his treatment with Dr. Eyster and again returned to see Dr. Murati for an impairment rating did complaints involving the lower back surface. Dr. Murati diagnosed radiculopathy. He came to this conclusion without the benefit of any sort of diagnostic tests. Instead, he relied upon claimant's depressed right ankle reflex, a finding that had not been made by any other physician.

Based upon the inconsistency within the medical records, the Board finds that claimant has failed to establish it is more probably true than not that his low back was injured as a result of his work activities. Thus, that portion of Dr. Murati's rating which reflects the low back will be excluded. The net result of Dr. Murati's impairment rating is 10 percent to the body as a whole and is comprised of 5 percent whole body for the cervical impairment and 5 percent to each of the shoulders (which when converted each shoulder yields 3 percent to the whole body).

Turning now to the cervical spine and the shoulders, the Board notes the 5 percent assessed by Dr. Murati for claimant's cervical complaints is consistent with the opinion expressed by Dr. Fevurly. Claimant has repeatedly expressed neck complaints since 2002, while off work for treatment of his upper extremities. The fact that claimant was not actively working on the date he reported these complaints to the company physician is not troublesome in this case. Claimant testified that the severity of his upper extremity problems masked his upper back and neck complaints. Based upon these facts and circumstances, the Board finds that claimant sustained a 5 percent permanent impairment to his cervical spine as a result of his work-related activities.

Both Drs. Murati and Eyster assessed a 5 percent permanent impairment to claimant's right shoulder as a result of his accident. Although Dr. Fevurly testified that the limitations seen in claimant's right and left shoulders were the result of a degenerative condition, and not, in his view, work-related. This is unpersuasive as he further testified that those conditions could be aggravated by work. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>17</sup> Accordingly, the Board finds claimant sustained a 5 percent permanent partial impairment to his right shoulder. When converted, this yields a 3 percent to the body as a whole.

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<sup>17</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

As for the left shoulder, the Board is persuaded that claimant sustained permanent impairment to that scheduled member as well. He has consistently complained of pain in the left shoulder and both Dr. Murati and Dr. Fevurly noted bilateral shoulder impingement. The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>18</sup>

After weighing the testimony of the claimant and the physicians, the Board finds claimant is entitled to a 5 percent permanent partial impairment to the left shoulder, which when converted, yields 3 percent to the body as a whole.

When properly combined, the 5 percent to the cervical spine and the 3 percent to each of the shoulders yields 11 percent to the body as a whole. The ALJ's Award is modified to reflect a 11 percent impairment to the whole body.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 9, 2004, is modified as follows:

The claimant is entitled to 45.65 weeks of permanent partial disability compensation at the rate of \$304.05 per week or \$13,879.88 for a 11% permanent partial disability, making a total award of \$13,879.88.

As of January 27, 2005 there would be due and owing to the claimant 42.29 weeks of permanent partial disability compensation at the rate of \$304.05 per week in the sum of \$12,858.27 for a total due and owing of \$12,858.27, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$1,021.61 shall be paid at the rate of \$304.05 per week for 3.36 weeks or until further order of the Director.

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<sup>18</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).



**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael Snider, Attorney for Claimant  
Vince Burnett, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director